probably a public nuisance.[9] But the upper signboards could scarcely be regarded as such an illegal obstruction of the highway,[10] and the court made no distinction, but rightly based its decree entirely on the infringement of the adjoining owner's private right. To entitle him to relief, recognition of the right of publicity as a private right in no way dependent upon interference with the public easement is essential, not only in the comparatively rare cases, where no such interference occurs, but also where the obstruction has been legally authorized by the state or municipal authorities. Consequently, decisions granting relief in such cases are direct authority for this so-called right of publicity, except in so far as they can be based upon the violation of other rights involved.[11]

While it seems eminently desirable under modern conditions that the existence of such a right should be recognized, it is to be observed that only a substantial obstruction of the view from the street should constitute a violation of it.[12] In this it is to be distinguished from the easement of access, any interference with which is actionable,[13] and is more nearly analogous to the easement of ancient lights.[14]

VALUATION OF PUBLIC SERVICE FRANCHISES. — It is a judicial commonplace that "a franchise is property." But this statement, like many another legal axiom, is fraught with ambiguity.[1] It does not distinguish

[9] Commonwealth *v.* Wilkinson, 16 Pick. (Mass.) 175; Commonwealth *v.* King, 13 Metc. (Mass.) 115. See also 2 ELLIOTT, STREETS AND HIGHWAYS, 3 ed., § 832.

[10] Loth *v.* Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847; Chambers *v.* Ohio Life, etc. Ins. Co., 1 Disney (Oh.) 327, 335; Hawkins *v.* Sanders, 45 Mich. 491, 8 N. W. 98.

[11] Perry *v.* Castner, *supra;* Alabama Terminal R. Co. *v.* Crawford, 10 Ala. App. 296, 64 So. 650.

[12] The cases in which relief has been denied may be distinguished on this ground, although the language of some of them is broad enough to deny the existence of such a right altogether. Hay *v.* Weber, 79 Wis. 587, 48 N. W. 859; Cummins *v.* Summunduwat Lodge, 9 Kan. App. 153, 58 Pac. 486; Wornser *v.* Brown, 149 N. Y. 163, 43 N. E. 524; Hawkins *v.* Sanders, *supra;* Tracy *v.* Le Blanc, 89 Me. 304.

[13] See 15 COL. L. REV. 142, 154.

[14] See SALMOND, TORTS, § 81. The principal case might perhaps be supported on the additional ground that there was no justification for the damage intentionally caused by the obstruction. Burker *v.* Smith, 69 Mich. 380, 37 N. W. 838; Flaherty *v.* Moran, 81 Mich. 52, 45 N. W. 381. See also Tuttle *v.* Buck, 107 Minn. 145, 119 N. W. 946. *Contra,* Metzger *v.* Hochrein, 107 Wis. 267, 83 N. W. 308; Letts *v.* Kessler, 54 Oh. St. 73, 42 N. E. 765. But there is little likelihood that this so-called "spite fence" doctrine would be followed in England. Potts *v.* Smith, L. R. 6 Eq. 311, 317. This question, however, is less likely to arise there because the obstruction is generally justified in order to prevent the acquisition of an easement of light. See 2 WASHBURN, REAL PROPERTY, 6 ed., 319; TUDOR, LEADING CASES, 3 ed., 201. Such a justification would not obtain where only the view of the premises is involved. Smith *v.* Owen, 35 L. J. Ch. 317. Consequently, the question might well arise where the obstruction was on private property.

[1] The cases abound in sweeping statements to the effect that a franchise is "taxable, inheritable, alienable, subject to levy and sale under execution, to condemnation under the exercise of the right of eminent domain, and invested . . . with the attributes of property generally." People *v.* O'Brien, 111 N. Y. 1, 41, 18 N. E. 692, 699. Such language is obviously too broad. Not all franchises are inheritable and alienable, and in the absence of an express provision to the contrary such franchises are

as to the character of the "franchise," nor as to the purpose for which it is to be considered "property." For the sake of clearness, exclusive and irrevocable privileges must be differentiated from franchises which amount to mere revocable licenses, and varying principles will apply to these as the cases have to do with taxation, eminent domain, or rate regulation. All the authorities agree that a franchise, whether revocable or irrevocable, may be taxed.[2] Although this conclusion is reached by varied and often devious methods, the correctness of the result cannot be doubted. Such a privilege authorizes the gainful use of private property in a particular manner. As this is a valuable right, it should be taxed as such during its existence.[3] But such value continues only up to the time when the state acts, and when acquisition by eminent domain or regulation of rates is in question different principles apply. Where there is a limitation on the state's right to revoke the franchise, or the holder of it has been promised certain privileges, the contract clause of the Constitution will protect the agreement.[4] Such rights have an undoubted value and cannot be taken away without compensation, but on principle it would seem at least arguable whether the holder can demand to earn a dividend on them.[5]

But, however that may be, when the state has given a mere grant of user and has not bound itself in any way, when the franchise amounts to no more than a revocable license, what possible claim has the grantee of such a privilege to any allowance, either by way of compensation in eminent domain proceedings, or of valuation in proceedings to regulate rates, beyond perhaps the actual expense incurred in obtaining the grant? [6] "The franchise has added no producing power to the realty or

subject to the state's power to fix reasonable rates. This "property" is of such a peculiar nature that its value may be largely destroyed by the power of the state to fix rates unless there is an express guaranty to the contrary. See Detroit *v.* Detroit, etc. Ry., 184 U. S. 368; Vicksburg *v.* Vicksburg, etc. Co., 206 U. S. 496. Nor do they deprive a municipality of the right to supply itself. Hamilton, etc. Co. *v.* Hamilton City, 146 U. S. 258.

[2] See People *v.* O'Brien, *supra;* Society for Savings *v.* Coite, 6 Wall. (U. S.) 594; Brisbane *v.* Brisbane, etc. Co., 9 Queens. L. J. 67; BEALE AND WYMAN, RATE REGULATION, § 363.

[3] This tax "is quite consistent with the value of the franchise being subject to diminution by a diminished income as a result of legislation reducing rates." BEALE AND WYMAN, RATE REGULATION, § 363.

[4] New Orleans Gas Co. *v.* Louisiana Light Co., 115 U. S. 650; New Orleans Water Works Co. *v.* Rivers, 115 U. S. 674. In such cases, of course, the courts will construe the agreement strictly in favor of the state. Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

[5] Where there is, for example, a franchise, irrevocable for a definite period of time, the only right properly protected under the Constitution would seem to be that of doing business at reasonable rates during that period. This certainty, doubtless, will increase the market value of the company's securities. It will have to be paid for if the state acquires it by eminent domain, because this constitutionally protected certainty of earning power is being taken. But by what right does the company claim to earn a return on this intangible property? It has not dedicated any property to a public use. It has simply accepted a valuable gift which it is admitted is irrevocable; but why does that fact lead to the result that the public served by the company should pay higher rates to the company? It would seem that the contract which is protected is, as has been said before, only the right to earn reasonable rates on the tangible property for the given period.

[6] In such a case, condemning the property is equivalent to a revocation of the revocable license. See Kingsland *v.* Mayor of New York, 110 N. Y. 569, 583.

personalty, it has simply authorized their employment in a particular way." [7] This authorization gives the right to operate as a profitable going concern what would otherwise be a job lot of material.[8] Not satisfied with the privilege of using its property in a profitable employment, the contention on behalf of the public service company is that such a privilege is property for which it must be compensated when deprived of it, and upon which it is entitled to earn a return. A practical difficulty is at once suggested as to the method by which such a franchise could be valued. In a rate case, the problem seems without solution. For to determine what rates are reasonable, we look at the present value of the property on which the company has a right to earn returns. The value of this revocable franchise before the state acts, results from the rates which the state then allows the company to charge. If the franchise be given a value based on these present rates and this be included in present value, the logical result of the vicious circle must be that the rates of a public service company can never be regulated by the state.[9] While some of the courts balk at the application of this doctrine to rate regulation, they do not seem to realize that an equal absurdity will follow from giving value to a revocable franchise in the eminent domain cases. If one grants that present earning power may give value in an eminent domain case but asserts that it must not be considered in rate-making, a state need only regulate first and condemn later to achieve the desired result. Such a *reductio ad absurdum* shows that the two classes of cases must stand on common ground.[10] The authorities on this subject

[7] See Consolidated Gas Co. *v.* City of New York, 157 Fed. 849, 874. The court in People *v.* O'Brien, *supra*, seeks to distinguish between a mere privilege to engage in business and a privilege to use public property; but in each case, so far as the interest of the public service company goes, its property is not made more productive except in the sense that the right to use it in a certain way or in a certain place gives the owner of the right an increased income. The property dedicated to the public use is affected equally in the two situations.

[8] From the very nature of the franchise right it is responsible for a large part of a company's value as a "going concern," which almost all courts recognize as a proper item in a property valuation. See National Water Works *v.* Kansas City, 62 Fed. 853; Gloucester Water Supply Co. *v.* Gloucester, 179 Mass. 365, 60 N. E. 977; Omaha *v.* Omaha Water Co., 218 U. S. 180. As was said in Brunswick Water District *v.* Maine Water Co., 99 Me. 371, 375–381 (cited in BEALE AND WYMAN, RATE REGULATION, § 362, as opposed to the separate valuation of franchises), the franchise is what makes the structure legally "a going concern structure," and that the property cannot "be valued in entire disregard to its franchise characteristics," and "that the value of money invested, in whatever form it now is, is affected by the right to use it in that form." Such a recognition of the existence of the franchise stands on quite a different ground from that which seeks to capitalize present income.

[9] But such a result is unthinkable. As Mr. Justice Holmes said on this general question, in Cedar Rapids Gas Co. *v.* Cedar Rapids, 223 U. S. 655, 669, "On the one side, if the franchise is taken to mean that the most profitable return that could be got free from competition is protected by the Fourteenth Amendment, then the power to regulate is null. On the other hand, if the power to regulate withdraws the protection of the Amendment altogether, then the property is nought. . . . Neither extreme can have been meant." See Willcox *v.* Consolidated Gas Co., 212 U. S. 19, as an example of the attitude taken by the Supreme Court in a typical case of rate regulation.

[10] The courts have recognized this fact frequently. "The question of what is just compensation in such a case [a rate case] is, we think, in all respects analogous to the question which arises in every case of appropriation under the power of eminent domain. . . ." San Diego Water Co. *v.* San Diego, 118 Cal. 556, 567, 50 Pac. 633,

are in a state of confusion. In general the cases say broadly that such a franchise must be valued when the state wishes to acquire the property of the company by eminent domain.[11] The only square authority for this, however, seems based on a misunderstanding of the decision of the Supreme Court of the United States in the Monongahela Case.[12] Whatever the opinion of that learned body may then have been on the general question of revocable franchises, it was not presented to it for decision in that case.

The Supreme Court has not as yet passed on the question of valuing such franchises in rate regulation, expressly reserving it in the Consolidated Gas Case.[13] The New Jersey courts have recently had the question before them. *Public Service Gas Co.* v. *Board of Public Utility Commissioners*, 92 Atl. 606.[14] Judge Swayze, speaking for the Supreme Court of the state, held that a franchise should not be valued for rate purposes beyond the amount which was expended to secure it.[15] The

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636. And to the same effect see the opinion of Morrow, J., in Spring Valley Water Works *v.* San Francisco, 124 Fed. 574, 594 (Circ. Ct.).

[11] When the facts of these cases are examined it will be found that there is either a contract protected by the Constitution or some facts to show the intention of the legislature that the company should earn returns on some sum of money which has been determined by that body to be the value of the franchise. See, for example, Montgomery County *v.* Schuylkill Bridge Company, 110 Pa. St. 54, 20 Atl. 407, where the franchise was a perpetual one; and the Monongahela Case, which is explained *infra*, note 12.

[12] In that case, Monongahela Navigation Co. *v.* United States, 148 U. S. 312, the charter of incorporation of the company gave the state an option to take over the property at a fixed sum, and the case decided that until this option was exercised the company had an irrevocable franchise, and that since the national government was not suing as the assignee of the state's right, it must pay for this franchise just as in any case of condemnation of an irrevocable privilege. See PAMPHLET LAWS OF PENNSYLVANIA for 1840, 677, and also the official record of the Monongahela Case in the Supreme Court, at 33, 39, 50. Ignoring these facts, it has been said upon the supposed authority of this case that a revocable franchise is to be valued for purposes of eminent domain. Spring Valley Water Works *v.* San Francisco, 124 Fed. 574, 594, is a square decision to this effect. For a *dictum* looking the same way, see the decision of the lower court in the Consolidated Gas Case, *supra*, 875. See also Town of Bristol *v.* Bristol and Warren Water Works, 23 R. I. 274, 49 Atl. 974. But see WHITTEN, VALUATION OF PUBLIC SERVICE CORPORATIONS, § 664; Norwich Gas, etc. Co. *v.* City of Norwich, 76 Conn. 565, 57 Atl. 746; Kennebec Water District *v.* Waterville, 97 Me. 185, 54 Atl. 6; Appleton Water Works Co. *v.* Railroad Commission, 154 Wis. 121, 142 N. W. 476; Newburyport Water Company *v.* Newburyport, 168 Mass. 541, 47 N. E. 533; Gloucester, etc. Co. *v.* Gloucester, 179 Mass. 365, 60 N. E. 977.

[13] Willcox *v.* Consolidated Gas Co., 212 U. S. 19. The basis of the decision of the court in allowing value to be given to the franchise in that case was a valuation which had been made under a legislative act and which had been acted upon for many years by the company and the investing public. (47) The court does not give an opinion upon the result in the absence of such an agreement, but says that the case must stand "upon its own peculiar facts, and the decision thereon can form no precedent in regard to the valuation of franchises generally." (48) See the opinion of Hough, J., in the lower court, Consolidated Gas Co. *v.* City of New York, *supra*, 872, for a very careful discussion of the general question. Franchise value is discussed and disallowed in the following rate cases: Lincoln Gas, etc. Co. *v.* Lincoln, 182 Fed. 926 (later reversed on another ground in 223 U. S. 349); Cumberland Telephone, etc. Co. *v.* Louisville, 187 Fed. 637; Home Telephone Co. *v.* City of Carthage, 235 Mo. 644, 139 S. W. 547. See also Cedar Rapids, etc. Co. *v.* Cedar Rapids, 223 U. S. 655, 669.

[14] For a complete statement of this case, see RECENT CASES, p. 526.

[15] Public Service Gas Co. *v.* Board of Public Utility Commissioners, 84 N. J. L. 463, 87 Atl. 651.

Court of Errors and Appeals reversed this decision with the generous if unsound generalization that a public service company should be allowed to earn rates on the taxable value of its property, and the remark that private rather than government ownership of public utilities should be encouraged. There would seem to be no principle upon which the result of this case can be justified. If as a matter of fact a public service company deserves a greater income than that to be obtained by capitalizing the actual value of its property at the given rate of interest [16] and determining its rates accordingly, the proper method is to face the issue squarely and raise the rate of interest, rather than to pad the capital account with fictitious values. Any other method savors of intellectual dishonesty.

UNREGISTERED AUTOMOBILES AND TORT LIABILITY. — It has never been easy to reconcile, or even to disentangle, the theories which the Massachusetts Supreme Judicial Court has applied in determining the relation of illegal conduct to recovery in actions of tort. A recent decision adds perceptibly to the difficulty of the task. The defendant was the owner of an automobile, which was improperly registered. His son, with his assent, but not as his agent, took some friends for a ride in the car, and negligently injured the plaintiff. The court held that the father's failure to register the car according to law made him liable for the son's negligence. *Gould* v. *Elder*, 107 N. E. 59.

The historical background of the decision is complex. One group of cases, denying recovery for injuries sustained by travelers on Sunday who were not engaged in errands of mercy or of necessity, is now but a memory of the past, quaintly flavored with New England Puritanism.[1] The more modern Massachusetts law on the subject has its foundation in two cases decided some thirty years ago. One held that illegal conduct on the part of the defendant, where it is a contributing cause of the injury, does not of itself render him liable, but is merely evidence of his negligence.[2] In the other the plaintiff's violation of a traffic ordinance, directly contributing to his own injury, was held an absolute bar to his recovery.[3] With the advent of the automobile and the multiplication of

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[16] As to what is a proper rate of interest authorities differ. In the principal case a return of eight per cent was allowed upon the inflated valuation adopted by the court. Six per cent is a usual figure, and seven per cent was named as a proper return if the franchise "value" was not to be included, by Charles W. Needham, in his article on "Franchises," 15 COL. L. REV. 97.

[1] The Sunday law cases are collected in Smith *v.* Boston & Maine R., 120 Mass. 490. They have since been overruled by statute. R. L. c. 98, § 17. The theory of the cases has been criticised on the ground that it fails to distinguish between illegality which is a cause rather than a mere condition of the injury. See Sutton *v.* Wauwatosa, 29 Wis. 21; Johnson *v.* Irasburgh, 47 Vt. 28. The latter case, however, justifies the result where the defendant is a municipality, on the ground that no duty of care was owed to persons unlawfully on the highway.

[2] Hanlon *v.* South Boston Horse R. Co., 129 Mass. 310. For a criticism of this view, see an article by Dean Thayer, "Public Wrong and Private Action," 27 HARV. L. REV. 317, 321 ff.

[3] Newcomb *v.* Boston Protective Department, 146 Mass. 596, 16 N. E. 555. The court denied that there was any inconsistency in thus treating a plaintiff with greater